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**Via Electronic Submission**

David A. Stawick  
Secretary  
Commodity Futures Trading Commission  
Three Lafayette Centre  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20581

Re: Request for Comment on Options for a Proposed Exemptive Order Relating to the Trading and Clearing of Precious Metal Commodity-Based ETFs; Concept Release

Dear Mr. Stawick:

The Chicago Board Options Exchange, Incorporated ("CBOE") is commenting on the release ("Release") by the Commodity Futures Trading ("CFTC") regarding the proposal by The Options Clearing Corporation ("OCC") to clear options and security futures on certain exchange traded funds ("ETFs") based on palladium and platinum as well as a concept release on whether the CFTC should exempt the trading and clearing of certain options and futures on gold, silver, palladium, and platinum ETFs on a categorical basis.<sup>1</sup> As we discuss in detail in this letter, the options on the palladium and platinum ETFs clearly are options on securities. As such, they are within the exclusive jurisdiction of the Securities and Exchange Commission ("SEC"). Nevertheless, to prevent any legal uncertainty, we urge the CFTC to issue the exemption requested by OCC as soon as possible, because the overlying securities are registered and approved for trading by the SEC and because this past April the SEC approved CBOE to list and trade the products<sup>2</sup> and OCC to issue and clear the products.<sup>3</sup> In addition, we urge the CFTC to adopt a "category exemptive process" by which OCC does not need to seek an exemption for every new physically-settled option on an exchange-traded fund based on metals (single or basket). Moreover, we believe that the category exemptive process should include physically-settled options on *any* ETF traded as a security as well as any options on any index or calculation based on or derived from such options, regardless of whether the instrument involved in the ETF is a metal or a different type of instrument.

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<sup>1</sup> See 75 FR 60411 (September 30, 2010).

<sup>2</sup> See Securities Exchange Act Release No. 61892 (April 13, 2010), 75 FR 20649 (April 20, 2010) (approving SR-CBOE-2010-015).

<sup>3</sup> See Securities Exchange Act Release No. 61958 (April 22, 2010), 75 FR 22673 (April 29, 2010) (approving SR-OCC-2010-03).

OCC has filed with the CFTC a request for approval to clear and settle options on palladium and platinum ETFs. Even though, as discussed below, the products are options on securities, and thus within the exclusive jurisdiction of the SEC, OCC is obligated to submit the request because it is both a derivatives clearing organization (“DCO”) registered pursuant to the Commodity Exchange Act (“CEA”) and a securities clearing agency registered under the Securities Exchange Act of 1934 (“Exchange Act”). As a preliminary matter, we believe that the CFTC should immediately provide the requested exemption. The products are clearly securities and should not be subject to the jurisdiction of the CFTC. First, the proposed options products clearly are options. They meet all the economic characteristics of options, including a strike price, expiration date, and the customary provision of puts and calls, whereby the holder has only rights and his loss is limited to the premium paid while the writer has obligations to perform under the contract.

Second, the proposed options underlie securities.<sup>4</sup> The ETFs are registered as securities under the Securities Act of 1933 and they trade as securities on national securities exchanges registered as such under the Exchange Act. The fact that the ETFs are designed to reflect the performance of platinum and palladium is irrelevant to their status as securities. Thus, since the proposed products are options underlying securities, they are subject to the exclusive jurisdiction of the SEC. The CFTC has no jurisdiction over these products, and thus issuance of an exemptive order is arguably necessary only in that it will provide legal comfort for OCC to clear the products.

Third, we see no reason to differentiate these ETF options from options on gold and silver ETFs for which the CFTC previously has issued an exemption.<sup>5</sup> The Release offers some empirical observations about the difference between the palladium and platinum markets versus the markets for gold and silver. Specifically, the Release notes that the global market for palladium and platinum supplies are considerably smaller in volume than the supplies of gold and silver and come predominantly from mine production concentrated in a small number of countries. CBOE respectfully submits that these empirical observations are irrelevant to the question of whether options on palladium and platinum ETFs should trade as securities or not. As noted above, the palladium and platinum ETFs are securities, and options overlying them are securities. The liquidity, supply, and concentration of the commodities involved in the ETFs are factors that should not change the legal analysis of the options at all. If the CFTC has surveillance and regulatory concerns regarding the underlying palladium and platinum markets, these can be addressed through interagency cooperation between the SEC and CFTC and through discussions at the Intermarket Surveillance Group (“ISG”). Such concerns are not and should not change the legal analysis that options on these ETFs are securities and should trade as such.

With respect to the CFTC’s request for comment on whether the trading and clearing of options on all or some precious metal commodity-based ETFs should be categorically

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<sup>4</sup> See Securities Exchange Act Release Nos. 61220 (December 22, 2009), 74 FR 68895 (December 29, 2009) (approval of ETFS Palladium Trust) and 60970 (November 9, 2009) 74 FR 59319 (November 17, 2009) (approval of ETFS Platinum Trust).

<sup>5</sup> See 73 FR 31981 (June 5, 2008) (exemptive order for options on SPDR Gold Trust), 73 FR 79830 (December 30, 2008) (exemptive order for options on iShares COMEX Gold Trust Shares and iShares Silver Trust Shares), 75 FR 37406 (June 29, 2010) (exemptive order for options on ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares).



exempted from the CEA, we strongly believe that such an exemption should be granted. There is no reason to differentiate among options on ETFs on precious metals based on the metal(s) involved or the nature of the securities trust that issues the instrument involving the precious metal(s). If the instrument overlying an option is a security registered with the SEC (and particularly if it is trading on a securities exchange), then the underlying option should automatically be eligible to trade as a security on a securities exchange. To require an instrument-by-instrument exemptive request process by OCC each time a new product is introduced needlessly delays the process for trading new securities options products that happen to involve commodities. In fact, we see no reason to limit this generic exemption to precious metals. The same legal reasoning for treating options on precious metal ETFs to trade as securities applies to securities ETFs involving any instrument. For example, an ETF holding oil or gas futures is as much a security as an ETF on gold or silver. As noted above, if the CFTC has concerns about the ultimate commodity involved in the ETF overlying the option, it can engage in interagency surveillance with the SEC or use the ISG to address issues of derivative instruments trading on different markets, but ultimately involving the same commodity. That approach has been used for over 30 years for securities indexes, where derivatives trade on either securities or futures exchanges based on the legal nature of the underlying derivative.

Most importantly, we have a fundamental issue with the need for OCC to seek an exemptive order for options on ETFs and believe that the process by which OCC feels compelled to seek such an order should be addressed. The contorted position that OCC finds itself in as a dual registrant due to divided jurisdiction between the CFTC and SEC forces it to self-certify, seek approval, or seek an exemption of the CFTC to clear securities products that are under the exclusive jurisdiction of the SEC. This process introduces an additional layer of delay of many months before CBOE can introduce a new securities options product. In particular, we do not understand the need for OCC to undergo this process for a product that is virtually identical to other products for which it has already obtained exemptive orders from the CFTC, but for a difference in the metal involved or the issuer of the ETF.<sup>6</sup> Our concerns, however, also would extend for any new options product if that product underlies a security that has been registered with the SEC and is trading on a national securities exchange. The process for seeking a CFTC exemption for the options on securities merely adds months to the regulatory process for introduction of a new securities options product. We urge the CFTC to work with the SEC to create a process to avoid CFTC review of products that are clearly securities options. At a minimum, we support OCC's previous requests to the CFTC that the agency issue a blanket exemption to permit OCC to clear physically-settled options on any ETF trading as a security and strongly believe that the CFTC should do so promptly. Any reluctance to do so is inconsistent with the commitment made by Chairman Gensler and Chairman Schapiro in September 2009 in their hearings (and issuance of a report) on harmonization of the securities and commodities laws to reduce jurisdictional issues that impede the introduction of new products.<sup>7</sup>

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<sup>6</sup> The identity of the issuer of commodity-based ETF that is a security is irrelevant to the issue of whether an option on that ETF is a security. Any commodity-based ETF that is registered with the SEC (and particularly one that trades on a national securities exchange) is a security, regardless of the identity of the issuer.

<sup>7</sup> A Joint Report of the SEC and the CFTC on Harmonization of Regulation, October 16, 2009.



Moreover, a failure to provide legal certainty on this issue is inconsistent with the tenor of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank”). Several of the provisions of Dodd Frank are intended to hasten the process of resolving jurisdictional disputes between the SEC and CFTC and to provide a more expeditious means for obtaining legal certainty on a financial instrument in which both agencies believe they have a jurisdictional interest. While the portions of Dodd Frank that cover this area are a good first step towards achieving these goals, CBOE believes a more effective approach and one which more efficiently uses the two agencies limited resources is for the CFTC to issue a broad generic exemptive for options on ETFs that trade as securities as well as any options on any index or calculation based on or derived from such options as we suggest above.

In the Release, the CFTC also poses four specific questions for comment that touch upon the issues raised in the Release. This letter has already addressed the first three of these questions. Specifically, (1) there is no reason the CFTC should not provide a categorical exemption from Section 4(c) of the CEA for options on gold and/or silver ETFs; (2) the differences between the palladium and platinum markets versus the gold and silver markets do not justify a different regulatory approach for purposes of a CFTC exemption for options on ETFs on these products; and (3) the CFTC should extend a Section 4(c) exemption to options on palladium and platinum ETFs on a categorical basis (without regard to issuer). We also hold strong views on the fourth question posed by the Release, namely, if the CFTC continues to grant Section 4(c) exemptions on commodity-based ETFs, whether on an individual or categorical basis, should it include additional conditions and requirements, such as large trader reporting obligations, position limits, or other analogous requirements. As we noted in a prior letter to the CFTC on a request for comment that raised an analogous issue (“ETFS Release”), the answer to the fourth question should be a resounding no.<sup>8</sup>

The ETFS Release’s rationale for a proposed reporting requirements for the options on the gold and silver ETFs at issue is that such information might enhance the CFTC’s ability to collect and analyze market data concerning trading in the markets for gold and silver, and its ability effectively to monitor the trading activity and financial risk exposure of market participants and thus the risk exposure of any DCO, such as OCC. Simply because certain information from securities markets might be helpful to the CFTC, however, does not provide justification for the CFTC to de facto extend its jurisdiction (through imposition of reporting requirements) to securities products over which the SEC exercises exclusive and plenary jurisdiction. Instead, the CFTC should use existing arrangements between it and the SEC whereby the two agencies can and do share information where doing so will assist each in performing its respective regulatory functions. For example, the SEC and CFTC entered into a Memorandum of Understanding two years ago, the purpose of which was to enhance coordination between the agencies. Similarly, there is no reason for the CFTC to impose position limits on options on ETFs that trade as securities. As the Release notes in footnote 32, the securities exchanges that trade these products impose position and exercise limits on these products already. If such limits were insufficient, the SEC could force the securities exchanges to change them.

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<sup>8</sup> Letter dated May 17, 2010, from Edward J. Joyce, CBOE, to David A. Stawick, Secretary, CFTC, regarding a request for comment to exempt the clearing of certain products related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares available at: <http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=20299&SearchText=>

The same logic employed by the CFTC in the ETFS Release could be used by the SEC to insist that stock index futures markets and traders of stock index futures products provide the SEC with market and large trader information with respect to stock index futures or that traders of stock index futures be subject to SEC-imposed position limits. We assume that the CFTC would voice objections to such an action by the SEC. Most importantly, the use of an exemptive process to impose reporting requirements or position limits on securities market participants would be an improper use of exemptive authority by the CFTC. The exemptive process is simply a means by which OCC can obtain the necessary CFTC approval as a dual DCO-registered securities clearing organization to clear a securities options product. It should not be used by the CFTC as a means to impose quasi-jurisdiction over such a product by imposing conditions on the grant of an exemption.

In conclusion, we strongly support the grant of the exemption sought by OCC. At the same time, we also believe that the CFTC should issue a class exemption from the CEA for any option overlying an ETF that is registered with the SEC as a security. While we agree that the CFTC should exempt any option overlying a precious-metal ETF, we believe the CFTC should take a broader approach more consistent with Dodd Frank and good government to exempt all physically-settled options on ETFs that trade as securities as well as any options on any index or calculation based on or derived from such options.

Sincerely,

A handwritten signature in blue ink, appearing to read "Edward J. Joyce" with a stylized flourish at the end.

Edward J. Joyce

cc: CFTC Division of Clearing and Intermediary Oversight  
Ananda Radhakrishnan, Director  
Ryne Miller, Attorney Advisor  
David Van Wagner, Chief Counsel

SEC Division of Trading and Markets  
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